No. 80-1708

MAY 20 1981

ALEXANDER L. STEVAS

In the Supreme Court of the United States

OCTOBER TERM, 1980

DOW CHEMICAL COMPANY, PETITIONER

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND ANNE M. GORSUCH, ADMINISTRATOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

DONALD W. STEVER, JR.
BARRY S. NEUMAN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

MICHELE BEIGEL CORASH
General Counsel

LYDIA M. WEGMAN
Acting Deputy Assistant General Counsel

CHRISTINA KANEEN
Attorney

Environmental Protection Agency
Washington, D.C. 20460

QUESTION PRESENTED

Whether the Clean Air Act as amended in 1977 requires that national ambient air quality standards be met in each air quality region by systems of continuous emission controls rather than by systems dependent on dispersion techniques such as intermittent emission controls, except in circumstances defined in two provisions of the Act on which petitioner correctly does not rely in this case.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-13) is not yet reported. The decision and order of the Administrator of the Environmental Protection Agency (Pet. App. 26-33) are reported at 45 Fed. Reg. 19566 (1980).

JURISDICTION

The judgment of the court of appeals (Pet. App. 35) was entered on December 9, 1980. A petition for rehearing was denied on February 9, 1980 (Pet. App. 36). The petition for a writ of certiorari was filed effective April 2, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On May 31, 1972, the Administrator of the Environmental Protection Agency ("EPA"), acting pursuant to Section 110 of the Clean Air Act, 42 U.S.C. (1970 ed.) 1857c-5,[1] approved the Michigan State Implementation Plan for meeting national ambient air quality standards. That plan, *inter alia*, established sulfur dioxide and particulate matter emission limitations for power plants owned and operated by petitioner Dow Chemical Company as part of its industrial facilities in Midland, Michigan. 37 Fed. Reg. 10873 (1972); 40 C.F.R. 52.1170 *et seq.* The implementation plan also established compliance schedules requiring Dow to meet its sulfur dioxide emissions limitation by July 1, 1975, and its particulate matter emissions limitations by April 1, 1975. 40 C.F.R. 52.1175(d)(2)(ii) and (e).

Dow planned to comply with these requirements by shutting down its power plants and purchasing process steam from a nuclear plant then under construction and scheduled for completion in 1974. By 1974, however, Dow became aware that the nuclear plant would not be completed until several years after the 1975 attainment dates (Pet. 3; Pet. App. 27).[2] To meet the 1975 deadline, Dow chose instead to

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[1]The Clean Air Act was substantially amended and transferred to 42 U.S.C. (Supp. III) 7401 *et seq.*, by the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685, 42 U.S.C. (Supp. III) 7401 *et seq.* Subsequent citations are to the Act as amended in 1977, except where otherwise noted.

[2]"Pet. App. 27" refers to a particular section of EPA's formal ruling disapproving the proposed revision of the implementation plan concerned in this case. That ruling and another EPA ruling are reproduced in both the main appendix to the petition and in a supplemental appendix ("Supplemental Appendix B") filed by Dow; but the latter, although more readable, is not paginated. We shall refer only to the paginated appendix, but we note that any reference to a section within pages 14 to 33 of "Pet. App." indicates text that may also be found in the supplemental appendix.

use an intermittent control system. Dow purchased and installed in its coal-fired boilers equipment that enables it to shift from coal to oil or natural gas when it determines that atmospheric conditions are poor and pollution levels might exceed national ambient air quality standards. When atmospheric conditions permit, Dow continues to burn coal (Pet. App. 27). National ambient air quality standards (hereinafter "national standards") are met when ground level concentrations of a particular pollutant, as measured by monitoring devices in the immediate area, do not exceed specified limits (*id.* at 30). Dow's means of complying with national standards is known as a " 'dispersion technique' " because it permits the emission of pollutants in volumes that might exceed the standards if it were not for the fact that atmospheric conditions disperse some portion of the pollutants to other regions before they can concentrate and be measured at ground level near the source (*id.* at 5, 30, 32; see also *id.* at 10-13).

On May 17, 1974, Dow and the Michigan Air Pollution Control Commission ("MAPCC") entered into consent order No. 12-73-05, purporting to authorize Dow to postpone final compliance with its sulfur dioxide emission limitation until July 1, 1980, the revised projected date for completion of the nuclear plant. In the interim, the order authorized Dow to use its intermittent control system (Pet. App. 27, 46-50).[3]

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[3]MAPCC forwarded a copy of this order to EPA as "a 'compliance schedule' "; but it did not ask EPA to consider the order as a revision of the state implementation plan. *Dow Chemical Co.* v. *Costle*, 480 F. Supp. 315, 317 (E.D. Mich. 1978), appeal pending, No. 79-1491 (6th Cir., docketed Sept. 4, 1979). Accordingly EPA took no action on the order. In *Dow Chemical Co.* v. *Costle, supra*, Dow sought to compel EPA to approve the consent order as an implementation plan revision; the district court granted EPA's motion to dismiss for lack of subject matter jurisdiction.

By July 1977, it had become apparent that completion of the nuclear plant would extend beyond 1980. Dow and MAPCC executed a new consent order that did not extend Dow's compliance date, but provided that Dow would begin burning oil or natural gas continuously as of July 1, 1980. Use of the intermittent control system was again permitted until that date (Pet. App. 27, 53-60). At an MAPCC meeting attended by a Dow representative, an EPA spokesman stated that operation of an intermittent control system *in lieu* of constant emission controls was unacceptable (*id.* at 84, 86, 104).

Further delays pushed back the nuclear plant's projected completion date from 1980 until the end of 1982 (Pet. 3). MAPCC and Dow therefore entered into further negotiations, which culminated in a new consent order, APC No. 01-1979. This order (1) removed the requirement that Dow commence continuous burning of compliance fuels by July 1, 1980, and (2) authorized the continued use of an intermittent control system until December 31, 1982, at which time Dow would either purchase steam from the nuclear plant (if completed)[4] or use cleaner fuel on a continuous basis (Pet. App. 27, 70-77).

On February 14, 1979, this new consent order was formally submitted to EPA as a proposed revision of the state implementation plan pursuant to 42 U.S.C. (Supp. III) 7410(a)(3). On March 26, 1980, after publishing in the Federal Register a proposal to disapprove the revision and soliciting comments thereon, EPA took final action disapproving the proposed implementation plan revision (45 Fed. Reg. 19566 (1980); Pet. App. 26-33). In taking this action, EPA noted, *inter alia*, (1) that the Clean Air Act as amended in 1977 requires that national standards be met

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[4]In fact, Dow now states that the nuclear plant will not be operational until 1984 (Pet. 3 n.1).

through continuous emission reductions alone, *i.e.*, without consideration of the effects of dispersion techniques, (2) that the consent order does not provide for continuous emission reductions, and (3) that EPA was therefore required to disapprove it pursuant to 42 U.S.C. (Supp. III) 7401(a)(3).

Dow filed a petition to review that action in the court of appeals. That petition was consolidated with two other petitions filed by Dow seeking review of EPA's designation of Midland County as a "nonattainment" area for sulfur dioxides pursuant to 42 U.S.C. (Supp. III) 7407(d), *i.e.*, an area in which national standards have not been attained. The cases were consolidated because the court of appeals concluded that all three petitions presented the question whether Congress, in the Clean Air Act Amendments of 1977, precluded EPA from considering the effects of any intermittent pollution control system, used on an interim basis, in EPA's determination whether national standards are being met in a particular area (Pet. App. 2, 3-4).

The court of appeals denied the petitions for review, concluding (Pet. App. 4-5) that the plain language of the statute refuted Dow's contention that a valid state implementation plan could permit Dow to continue using its intermittent control system on an "interim" basis where the consent orders with the MAPCC established that it is economically infeasible for Dow to employ a continuous control system before the nuclear plant is in operation. The court considered the legislative history proffered by Dow in support of its construction of the statute, but concluded (Pet. App. 6; emphasis added) that although "*some* of the language [in the legislative history] relied upon by Dow" appeared to conflict with the statute's "unambiguous language," the legislative history does not warrant construing the statute in a manner contrary to its plain meaning.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with decisions of this Court of any other court of appeals. For these reasons, and because Dow's contention with respect to the permissibility of its "interim" use of an intermittent control system concerns an interim use extending through nearly a decade, with no assured end in sight, review by this Court is unwarranted.

1. The plain language of the Clean Air Act as amended in 1977 refutes Dow's contention that the Administrator of EPA is required to approve a revision of a state implementation plan that permits Dow to continue relying, on an "interim" basis, on its system of intermittent controls of sulfur dioxides. The Clean Air Act requires the Administrator to approve a state implementation plan if, *inter alia,* it includes "emission limitations" (42 U.S.C. (Supp. III) 7410(a)(2)(B)); and he must approve revisions to a state implementation plan if it meets all the requirements applicable to the original plan (42 U.S.C. (Supp. III) 7410 (a)(3)). In 1977, Congress defined "emission limitation" as a requirement limiting "the quantity, rate, or concentration of emissions of air pollutants *on a continuous basis,* including any requirement relating to the operation or maintenance of a source to assure *continuous emission reduction.*" 42 U.S.C. (Supp. III) 7602(k) (emphasis added). Congress similarly defined "means of emission limitation" as "a system of continuous emission reduction * * *." 42 U.S.C. (Supp. III) 7602(m). In another section added in 1977 (42 U.S.C. (Supp. III) 7423(a)), Congress declared, without exception, that "dispersion technique[s]" not in use before 1970 could not be used to affect "in any manner" the "degree of emission limitation required for control of any air pollutant under an applicable implementation plan"—*i.e.* national standards must be met with systems that do not

depend on such techniques. It defined " 'dispersion techniques' "as including "any intermittent or supplemental control of air pollutants varying with atmospheric conditions." 42 U.S.C. (Supp. III) 7423(b).

Congress was aware, however, of certain circumstances in which reliance on dispersion techniques as a means of meeting the national standards might be necessary. It thus provided two exceptions to the general prohibition against such reliance. In 42 U.S.C. (Supp. III) 7419(d)(2), the Act allows the Administrator to grant temporary waivers of constant emission reduction requirements for primary nonferrous smelters in certain cases. In 42 U.S.C. (Supp. III) 7413(d), it allows the Administrator to grant a delayed compliance order to any stationary source that demonstrates, *inter alia*, that it is unable to comply with the applicable implementation plan's requirements. Such orders, however, may permit deferral of compliance only until July 1, 1979, or until three years after the original date for final compliance, whichever is later. 42 U.S.C. (Supp. III) 7413(d)(1)(E).

The court of appeals correctly read the language of the 1977 Act as clearly inconsistent with Dow's "interim basis" argument. Dow does not purport either to operate nonferrous smelters or to have applied for a delayed compliance order, and even had it successfully applied for such an order, it would not have been entitled to the lengthy delay it is seeking. Thus, the general prohibition against meeting national standards through intermittent controls is fully applicable.

2. Contrary to Dow's contention (Pet. 8-13), the court of appeals did not ignore the legislative history of the 1977 Amendments. It "read and considered the language relied on by Dow" (Pet. App. 6) and still found Dow's proposed construction of the Act unpersuasive. The court agreed

(*ibid.*) that "some of the language" relied on by Dow seemed to conflict with the plain language of the statute, but it appended to its decision the portions of the relevant legislative report it evidently found more indicative of congressional intent (Pet. App. 7-13). It is clear, therefore, that the court's reference to authorities standing for the proposition that "courts do not turn to legislative history to shed light on the meaning of easily understandable and unambiguous statutory enactments" (*id.* at 6), does not, in context, conflict with *Train* v. *Colorado Public Interest Research Group, Inc.*, 426 U.S. 1 (1976), respecting the use of legislative history in construing a statute.

The court of appeals' refusal to read the legislative history as overcoming the plain language of the statute was correct. In a series of cases litigated in the early to mid-1970's (see Pet. 6), various parties had contended that the Administrator of EPA should approve state implementation plans under the Clean Air Act that permitted pollution sources to rely on techniques, such as tall stacks or intermittent releases of emissions, that prevented concentrations of pollutants in violation of national standards in a given region by dispersing them into other areas, rather than relying on continuous control systems that limited the total amounts of pollutants emitted. Congress, concerned that use of dispersion techniques would undermine the goals of the Clean Air Act, since such control systems allowed a state to meet standards by shifting its pollution elsewhere (see H.R. Rep. 95-294, 95th Cong., 1st Sess. 81-86 (1977) (hereinafter "H. Rep.")), amended the Act in 1977, as explained above, to make the federal policy concerning dispersion techniques completely clear. The House Report generally condemns use of dispersion techniques, particularly where sulfur dioxides and other sulfates are concerned, primarily because atmospheric loading of such pollutants can adversely affect the health of human beings and plant and animal life

hundreds of miles downwind from the source, even though national ambient air quality standards are met in the region in which the source is located. H. Rep. 95-294 at 84-87, 128-133. To be sure, the report was primarily critical of industry contentions that intermittent control systems were permissible means of meeting national standards without regard to whether the controls were permanent or temporary (H. Rep. 95-294 at 81), but suggestions in the legislative history that such control systems might be acceptable on a temporary basis in certain circumstances are entirely consistent with the plain language of the statute, which, as noted above, provides for such temporary use in the provisions concerning nonferrous smelters and delayed compliance orders.

The report's agreement (H. Rep. 95-294 at 91-92) with the "general thrust" of three court of appeals decisions (*Natural Resources Defense Council, Inc.* v. *EPA*, 489 F. 2d 390 (5th Cir. 1974), rev'd in part *sub nom. Train* v. *Natural Resources Defense Council Inc.*, 421 U.S. 60 (1975); *Big Rivers Electric Corp.* v. *EPA*, 523 F. 2d 16 (6th Cir. 1975), cert. denied, 425 U.S. 934 (1976); *Kennecott Copper Corp.* v. *Train*, 526 F. 2d 1149 (9th Cir. 1975), cert. denied, 425 U.S. 935 (1976)) similarly does not compel acceptance of Dow's reading of the statute. The *thrust* of the decisions is simply that pollution was to be controlled, if at all possible, by emission reduction rather than by dispersion techniques. While *Kennecott Copper* specifically approved interim use of intermittent controls (526 F. 2d at 1156, 1158-1160), that case concerned nonferrous smelters.

Finally, inasmuch as the court below was upholding EPA's construction of the statute, it had an additional basis for its holding. "It is by now a commonplace that 'when faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration.' "

EPA v. *National Crushed Stone Ass'n*, No. 79-770 (Dec. 2, 1980), slip op. 18, quoting *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965) (footnote omitted).

3. Dow's contention (Pet. 13-18) that the court of appeals' decision conflicts with this Court's construction of the Clean Air Act in *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60 (1975), and *Union Electric Co.* v. *EPA*, 427 U.S. 246 (1976), is without merit. In *Train* the Court merely held that, under the statute as it then existed, the states were free to make their own "choices of *emission limitations*" so long as national standards are met (421 U.S. at 79; emphasis added), *i.e.* a state was free to choose the mix of emission limitations imposed on sources in the state. This point was reiterated in *Union Electric* (427 U.S. at 266), another case concerned with the statute prior to the 1977 amendments. The Court added (*id.* at 267; emphasis added) that each state "has virtually absolute power in allocating *emission limitations* so long as the national standards are met," and it held that because the Clean Air Act is a technology-forcing statute, a state could insist on more stringent emission requirements, even if the Administrator deemed them economically and technologically infeasible.

In our view, requirements that permit national standards to be met through the use of dispersion devices such as intermittent controls did not constitute "emission limitations" even before the 1977 amendments, since they did not continuously limit the amount of pollutants released into the atmosphere. In any event, the statutory language now leaves no doubt that control strategies like the one used by Dow do not qualify as emission limitations (see page 6, *supra*), and the Administrator thus properly has refused to

approve the proposed state implementation plan revision that would permit them, even on an interim basis, where they do not come within the limited exceptions provided in the Act.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

DONALD W. STEVER, JR.
BARRY S. NEUMAN
Attorneys

MICHELE BEIGEL CORASH
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Acting Deputy Assistant General Counsel

CHRISTINA KANEEN
Attorney
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